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Supreme Court, U.S.
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No. 95-1006

In The

Supreme Court of the United States

October Term, 1995

VERN HERZOG, JR.,

Petitioner,

v.

PAUL S. DAMRON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Petition for Writ of Certiorari of Petitioner, Vern Herzog, Jr., ("Herzog") was docketed on December 25, 1995. On January 29, 1996 counsel for Herzog received in the mail the latest, Fourth Edition of Mallen & Smith, *Legal Malpractice* (1996), from the publisher, West Publishing Company. As shown in his original Petition, Herzog had relied on § 16.23 of the Third Edition of *Legal Malpractice* in both the District and the Ninth Circuit Court of Appeals to support his argument that a former client could bring an action at law for damages against his former attorney only when there has been a breach of some confidence. The District Court agreed with this authority and granted summary judgment (*see* Herzog's Petition for Writ of Certiorari, App. 21), but the Ninth Circuit did not mention that authority at all when it reversed.

The Fourth Edition of *Legal Malpractice* restates the proposition upon which Herzog relied and cites additional case authority to support it. Moreover, the treatise strongly criticizes the Ninth Circuit's decision herein:

> The Court of Appeals for the Ninth Circuit rendered a unique and questionable decision in 1995 concerning an Idaho lawyer, who represented a seller of a funeral business in 1982. In 1991 the lawyer advised the buyers to terminate their obligation under the agreement.[7] [fn. 7 at p. 485; Damron v. Herzog, 67 F.3d 211 (9th Cir. 1995).] Litigation followed between the buyers and seller in which the former client prevailed. He then sued the lawyer for the cost of that litigation. The court held that a cause of action

was stated, finding a "continuing" attorney-client relationship during the time the payments continued:

> We do not think that a drastic extension of Idaho law is necessary; rather, we find in the common law a continuing duty owed by attorneys to former clients not to represent an interest adverse to a former client on a matter substantially related to the matter of engagement. When such a duty is breached, the former client may bring a cause of action at law.[8] [fn. 8: *Id.* at 214-215. The court also said:
>
> > "Damron argues that for the purposes of a malpractice action, an attorney-client relationship existed at the time of Herzog's advice to the Wheatleys in 1991. Damron concedes that ordinarily an attorney-client relationship is terminated once representation has been completed. In this case, however, Herzog interposed himself into a matter substantially related to that for which he was previously retained by Damron. In so doing, Herzog created a situation in which the attorney-client relationship re-attaches. Under such circumstances, Damron argues, the duty of loyalty must continue after the representation is complete in the same way the duty of confidentiality continues. Because the duty of loyalty continues in this respect, Damron argues, Herzog should be subject to a malpractice action for breach of that duty. We agree."

> The attorney-client relationship ended. The logic is doubtful that it could "reattach" in some metaphysical manner. Although there is an appearance of impropriety in a lawyer acting adversely to a client once represented on the same subject matter, the duty to be protected is confidentiality, not loyalty.]
>
> The court said that "a duty of loyalty to a former client is coterminous with the duty of confidentiality with respect to matters substantially related to the initial matter of engagement." The conclusion, however, not only is illogical but was unnecessary. The court could have rested its decision on the lawyer's obligation of confidentiality, which precludes both disclosure and misuse of confidential information. Then, the former client would have to prove the misuse of confidential information, which caused injury, subjects on which the court's opinion is silent.

2 Mallen & Smith, *Legal Malpractice* (4th Ed.), § 16.23 at p. 485.

Herzog based his Petition for Certiorari on the fact that the Ninth Circuit Court of Appeals ignored relevant state law which could have enabled it to predict how the Idaho Supreme Court would decide the question at hand. Instead, the Ninth Circuit merely cited general principles of law and then applied its own logic to justify reversing the District Court. It is, therefore, not so much that Herzog believes the Ninth Circuit was wrong in the decision it reached, but that the Court of Appeals ignored the basic methodology which all federal courts sitting in diversity must adhere to.

Comparison between this latest edition of *Legal Malpractice* and the decision the Ninth Circuit emphasizes the latter's failure to review any of the available cases to predict what Idaho's decision would have been had this case been in its courts. This failure is clearly illustrated by the fact that only one of the cases cited by the treatise in § 16.23 to support its analysis of the liability of former attorneys to former clients for legal malpractice, appears in the Ninth Circuit's decision: *Maritrans G.P. v. Pepper, Hamilton & Scheetz*, 529 Penn. 241, 602 A.2d 1277 (1992). *See*, Herzog's Petition for Certiorari, App. 12, 14 and 15; 2 Mallen & Smith, *Legal Malpractice* (4th Ed.), § 16.23 at p. 483, fn. 1. And then, it must be noted, the treatise cited the *Maritrans* case only as an example of how, for one reason or another, "attorneys are being sued for legal malpractice arising from adverse representation against former clients or from untimely disqualification." 2 Mallen & Smith, *Legal Malpractice* (4th Ed.), § 16.23 at p. 483. Otherwise, none of the considerable body of authority which the treatise marshals to analyze the precise issue at bar appears in the Ninth Circuit's opinion. Such studied neglect of readily available sources of scholarly and judicial authority which could have helped predict how the state of Idaho would have decided the question at hand is strong and unbiased commentary on how far the Ninth Circuit Court of Appeals departed form the accepted and usual course of judicial proceedings, such that the exercise of the Supreme Court's supervisory power is now called for. Herzog believes that the

most efficient way to exercise this power is by the summary reversal of the Ninth Circuit's decision.

Respectfully submitted,

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